IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3251 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUKHVASI BABULAL SHARMA

Versus

KISHORKUMAR MAHIPATRAI ACHARYA

Appearance:

1. Special Civil Application No. 3251 of 2002

MR SUKHVASI B SHARMA for Petitioner No. 1

MR NC NAYAK for Respondent No. 1

MS JYOTSNA M PARMAR for Respondent No. 1

SERVED BY AFFIX.-(R) for Respondent No. 2

RULE SERVED for Respondent No. 3

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 09/08/2002

ORAL JUDGEMENT

1. The petitioner has approached this Court under Article 227 of the Constitution of India to challenge the order passed by the Labour Court, Ahmedabad dated 20th December, 2001 in Recovery Application No.1006/1995. The said Recovery Application has been rejected by the Labour Court on the ground that the petitioner is not a workman under Section 2 (s) of the Industrial Disputes Act and the said application at his instance cannot be entertained.

2. The facts in short can be stated as under :-

2.1. The petitioner joined the service of Ambica Mills Ltd. on 3rd October, 1978 vide letter of appointment dated October 17, 1978 which has been annexed at annexure-B to the petition. In the said letter, it has been stated that the petitioner was appointed as Security Supervisor in the Watch & Ward Department of the mill of on the terms stated therein. Term no.4 in that letter states that the petitioner is deemed to have joined the duty on 3rd October, 1978. It appears that the Ambica Mills Ltd., is closed since 24th October, 1994 and now respondent no.3 has been appointed as Official Liquidator of the said Mill. According to the petitioner even after the closure of the mill he was discharging his duty as Security Supervisor. He was not paid salary for five months and he was also not paid his legal dues despite repeated demands. He, therefore, was constrained to approach the Labour Court under the provisions of Section 33 (c) (2) of the Industrial Disputes Act by filing the aforesaid Recovery Application. The said Recovery Application as stated above has been rejected by the Labour Court on 20th December, 2001. The Labour Court, on the basis of the material produced before it has come to the conclusion that the petitioner was working as Security Supervisor and that he was drawing salary between Rs.3,477 and Rs.4,180/-. He was therefore, not a workman according to the definition of the workman as provided under Section 2 (s) of the Industrial Disputes Act. The Labour Court further held that since the petitioner was not a workman the Recovery Application at his instance was not maintainable.

3. Mr.S.B. Sharma learned counsel has filed his appearance in this matter for the petitioner. However, noticing the similarity in the name of the petitioner and the name of the counsel while dictating judgment, the counsel was asked about it by me and he informed the Court that he himself was the petitioner. Thus, eventhough he had filed appearance Mr.Sharma is appearing as party-in-person.

4. The petitioner has submitted before me that merely because the petitioner was designated as Security Supervisor and that he was drawing salary over Rs.1600/it cannot be said that he was not a workman as envisaged under Section 2 (s) of the Act. He has further submitted that the relevant test for determining whether an employee is a workman under the Act, the nature of duty assigned to him and the work done by him in the concern industry are required to be taken into consideration. He has further submitted that considering the nature of work done by him in the industry - concern it can well be said that he was covered under the said definition, and the application filed by him under the provisions of Section 33 (c) (2) of the Act was maintainable. He has further submitted that even according to the respondents he was working as a clerk in the said concern and not as Security Supervisor. Even in that view of the matter, according to him, he was a workman under the Act and his application could not have been rejected by the Labour Court on the ground that he was not covered under Section 2 (s) of the Act. In support of this contention Mr.Sharma has drawn my attention to the list of clerks working in the respondent which has been annexed as part of annexure-D at page 22 of the petition. If the said list is perused at page 3 (running page 24) under the heading security at Sr. no.1 name of the petitioner is mentioned. This list is part of the settlement arrived at between the Textile Labour Association and Y.S. Syntex Projects Limited and it is the new name of Ambica Mills in which the petitioner was working. It is an admitted position that the said Y.S. Syntex Project Limited is a new name of Ambica Mills.

5. The respondents of this petition though served have chosen not to appear before this Court and resist this petition. I am, therefore required to decide this petition in their absence.

6. Before entering upon the discussion with regard to the real status of the petitioner it will be appropriate to refer to the definition of the workman as given under Section 2 (s) of the Industrial Disputes Act:-

Section 2 (s) :-

"Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for

hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceedings under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950, or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison or; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

6.1. Perusal of this definition shows that when any person is employed in any industry to do manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward he will be considered as workman. Clause-iv of Section 2 (s) however provides that if a person is employed in a supervisory capacity and if he draws wages exceeding Rs.1600/- per mensem he will not be a workman under Section 2 (s) of the Act. The rest of the provisions of this section are not relevant for the purpose of deciding this petition. The letter of appointment of the petitioner which is at annexure-B shows that the petitioner was appointed as security supervisor in the Watch & Ward department of Ambica Mills Ltd. The said letter is dated 17th October, 1978. As stated above, at the relevant time the petitioner was drawing salary over Rs.1600/-. Normally the petitioner if these two factors are taken into consideration, it will fall under clause-iv of Section 2 (s) and he would not be workman within the meaning of that Section. However by now it is a settled principle of law that the status of the concerned person for the

purpose of Section 2 (s) is not required to be determined by taking only these two factors into consideration. The real test is what duty he was assigned and what work he was performing at the relevant time in the concerned industry. First of all to bring the petitioner under clause-iv of Section 2 (s) it will have to be made sure whether he was employed in supervisory capacity. If the letter of appointment is perused it nowhere states that the petitioner is employed in the supervisory capacity. Merely because the designation is security supervisor it cannot be said that he has been employed in the mill in supervisory capacity. The letter of appointment prescribed four conditions and none of these conditions nor even the preface of the letter indicates that the petitioner has been employed in the Ambica Mills in a supervisory capacity. If that be so, clause-iv of Section 2 (s) of the Act will not be attracted in his case.

6.2. Apart from this the evidence of respondent's witness Kishorekumar Mahipatrai. Acharya, a copy whereof is produced alongwith this petition at annexure-F shows that the petitioner was working in the Ambica Mills for the last seven years from the date of deposition of that witness in the Court as Security incharge. His duty hours were between 10:45 a.m. and 5:45 p.m. This witness has also described the duties performed by the petitioner. In that behalf he has stated that the petitioner was required to mark the presence of the members of the Watch & Ward department for all the three shifts and to assign duties to them in accordance with the working shifts of the Mill. He has further stated that the petitioner was also required to prepare the slip meant for visitors of the mill permitting entry to them and also to reproduce the attendance in the regular register from the kachcha register. He has further stated that whenever some items were required for the purpose of security he was calling for the same by submitting necessary indent to the store department. The petitioner was also discharging duty of gate keeper as and when regular gate keeper was not available. Looking to the aforesaid evidence of the witness for the respondent it clearly appears that the duties which were performed by the petitioner were not of supervisory nature. It may be that he might have to carry out some supervisory functions which was incidental to his main functions. But such supervision cannot place the petitioner in the category of the supervisor as it is understood in common parlance. The nature of the duty described by the witness clearly shows that like any other security personnel he was also required to keep

watch over the properties of the mill and to exercise vigilance over the working staff of the mill as well as the visitors. This appears to be his main function. The petitioner therefore cannot be said to be carrying out any work which was of any supervisory nature. If that be so, he can well be covered under the first part of definition of the workman as given in Section 2 (s) of the Act and he would not fall under the exception as provided under clause-iv of the said definition. It may also be stated here that relying upon the different decisions rendered by the Apex Court I have taken view that if the nature of duty shows that the concerned employee was not acting in the capacity of the supervisor he would be covered under the definition of Section 2 (s) of the Act. This decision has been rendered by me in the case of Shankarbhai Nathalal Prajapati v. Maize Products in Special Civil Application no.280/2002 dated 4/7/2002.

6.3. Mr.Sharma has relied on the decision of the Apex Court in the case of Ved Prakash Gupta v. M/s. Delton Cable India Pvt. Ltd., reported in 84 Labour Industrial Case at page 658. In that case it was held by the Apex Court, after discussing the nature of duty performed by the appellant of that case he was in fact a security inspector at the gate of the factory premises and that function was neither managerial nor supervisory in nature. In paragraph 12 of that judgment it has been observed as under :-

"12. A perusal of the evidence of WW-1 and MW-1 regarding the nature of the duties performed by the appellant shows that the substantial part of the work of the appellant consisted of looking after the security of the factory and its property by deputing the watchman working under him to work at the factory gate or sending them to watch-towers or around the factor or to accompany visitors in the factory and making the entries in the visitors' register as regards the visitors and in the concerned registers as regards materials entering and going out of the premises of the factory. It must be noted that MW-1 has admitted in his evidence that there is nothing in writing to show what duties are to be carried out by the appellant. Placed in such, a situation the appellant might have been doing other items of work such as signing identity cards of workmen, issuing some small items of stores like torch cells etc., to his subordinate watch man, which can be got from the stores even under the signatures of the watch man and filling

> up of application forms of other workman and counter signing them or recommending advances or loans or for promotion of his subordinates. It must also be remembered that the evidence of both WW-1 and MW-1 shows that the appellant could never appoint or dismiss any workman or order any enquiry against any workman. In these circumstances we hold that the substantial duty of the appellant was only of a Security Inspector at the gate of the factory premises and that it was neither managerial nor supervisory in nature in the sense in which those terms are understood in Industrial Law. In light of the evidence and the legal position referred to above we are of the opinion that the finding of the Labour Court that the appellant is not a workman within the meaning of Section 2 (s) of the Act is perverse and could not be supported. On the evidence available on record we hold that the appellant clearly falls within the definition of a workman in Section 2 (s) of the Act and that the reference of the dispute under Section 10 (i) (c) of the Act is valid in law.

6.4. As can been seen from the facts of this case that the duties performed by the petitioner were very similar. In view thereof, there is no difficulty for me to hold that the petitioner was neither working in managerial capacity nor in supervisory capacity and that he was working merely as security inspector. He therefore stands clearly covered under the definition of workman under Section 2 (s) of the Act. It may further be noted here that though the petitioner has been described as security supervisor in his letter of appointment, later on in the settlement referred to above, he has been put in the list of clerks working in the security department. The employer itself is not sure as to in which capacity the petitioner was discharging his functions. Apart from that from the evidence of KishoreKumar M. Acharya it becomes very clear that the petitioner was discharging duty as security inspector and he was neither employed in the supervisory capacity nor was he discharging any functions in the managerial capacity and in that view of the matter the finding given by the Labour Court is erroneous. The Labour Court could not have rejected the Recovery Application of the petitioner on that ground. The relief claimed in this petition, therefore, deserve to be granted. Since the Labour Court has not decided the application on its merits the matter is remanded back to the Labour Court to take its decision on its merits. It may also be clarified that in case the parties desire

to produce some additional evidence, over and above that has already come on record uptill now they may be permitted to do so. After taking into consideration the entire evidence that has come on record by now and the evidence that may come on record after remand of the matter, the Labour Court should decide the same on its merits as early as possible, bot later than 31st December, 2002. The petition is therefore allowed. Rule is made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

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